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IN THE

Supreme Court of the United States

WACHOVIA BANK, NATIONAL ASSOCIATION,
Petitioner,

—v.—

DANIEL G. SCHMIDT III, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE CLEARING HOUSE ASSOCIATION L.L.C. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

28 U.S.C. § 1348 provides that, with limited exceptions that are inapplicable here, "[a]ll national banking associations shall . . . be deemed citizens of the States in which they are respectively located."

The question presented is whether, for purposes of federal diversity jurisdiction, a national banking association is "located" in, and thus deemed to be a citizen of, every state in which the association is "physically present," as held by the Fourth Circuit, or instead has a more limited citizenship, as held by three other courts of appeals.

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Other Authorities

Bank of America, OCC Interpretive Letter No.
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INTRODUCTION

The Clearing House Association L.L.C. (the "Clearing House") submits this brief as *amicus curiae* in support of petitioner.[1]

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Clearing House is an association of eleven leading commercial banks that provides payment, clearing and settlement services to its member banks and other financial institutions.[2] The Clearing House often appears as *amicus curiae* in cases that raise significant legal issues relating to the commercial banking industry. The members of the Clearing House include eight federally chartered national banking associations ("national banks"). Five of these eight national banks have branches in sixteen or more states and one of those five has branch offices in thirty states. (For this purpose, we include the District of Columbia as a "state.")

The members of the Clearing House have a substantial interest in preserving their access to the federal judicial system. Affirmance of the Fourth Circuit

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[1] This brief is filed with the written consent of Petitioner and Respondents. Pursuant to Rule 37.6, counsel certifies that no counsel for any party authored any portion of this brief, nor did any person or entity other than the *amicus curiae* make any monetary contribution to the preparation or submission of this brief.

[2] The members of the Clearing House are Bank of America, N.A.; The Bank of New York; Citibank, N.A.; Deutsche Bank Trust Company Americas; HSBC Bank U.S.A., N.A.; JPMorgan Chase Bank, N.A.; LaSalle Bank, N.A.; UBS AG; U.S. Bank N.A.; Wachovia Bank, N.A. (petitioner herein); and Wells Fargo Bank, N.A.

decision, and concomitant rejection of the decisions of three other Courts of Appeals, would deprive national banks of their ability to invoke diversity jurisdiction whenever an adverse party is a citizen of a state in which the national bank maintains a branch office or has some other physical presence. For three members of the Clearing House, such a rule would preclude diversity jurisdiction whenever a citizen of twenty-four or more states is an adverse party.[3]

More generally, the members of the Clearing House, as leading U.S. banks, have a direct interest in assuring that national banks not be placed at a competitive disadvantage in respect of state-chartered banks and other state-chartered corporations, in accordance with long-standing and clearly-articulated congressional policy. A state-chartered bank such as SunTrust Bank, with branches in eleven states and the District of Columbia,[4] is for diversity purposes a citizen of at most two states. 28 U.S.C. § 1332. Yet, according to the Fourth Circuit, petitioner Wachovia – a bank chartered under federal law – is "located" in and therefore a citizen of at least fifteen states and the District of Columbia.

There is no logic to this result, and no good reason to force Wachovia to litigate in local courts while a state-chartered bank with branches in the same states has available to it the option to litigate in a federal court whenever the amount in controversy exceeds $75,000. There is likewise no logic or policy reason to deprive national banks of the same access to the federal judicial system as is enjoyed by brokerage firms (for example, Merrill Lynch has offices in fifty states), insurance companies and other financial institutions, or, more generally, all other corporations (many large corporations, such as Wal-Mart, may have a "physical presence" in all fifty states).

Restricting national banks' access to the federal judicial system through diversity jurisdiction – while state-chartered banks and corporations face no comparable limitation – puts national banks, for these purposes, very much into the category of second-class entities. This Court's adoption of the Fourth Circuit's

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[3] According to the FDIC, the eight national bank-members of *amicus curiae* have branch offices in these numbers of states:

National banks that are Clearing House members	Number of states (including the District of Columbia) in which the bank has branch offices
Bank of America, N.A.	30 states
U.S. Bank N.A.	25 states
Wells Fargo Bank, N.A.	24 states
JPMorgan Chase Bank, N.A.	18 states
Wachovia Bank, N.A.	16 states
HSBC Bank U.S.A., N.A.	9 states
LaSalle Bank N.A.	1 state
Citibank, N.A.	1 state

FDIC Institutional Directory, http://www.fdic.gov/idasp/main.asp (last visited Aug. 15, 2005). In addition, the above national banks undoubtedly have a "physical presence" – such as an office or even an ATM – in states where they do not have a branch. Further, Bank of America has military branches in one state not reflected in the FDIC count, and LaSalle Bank also has a branch in a state not counted by the FDIC.

[4] *See* FDIC Institutional Directory, http://www.fdic.gov/idasp/main.asp (last visited Aug. 15, 2005).

approach would force national banks to litigate numerous actions in local courts that in effect may be "home town" courts for their adversaries. Indeed, this is already occurring; since issuance of the Fourth Circuit decision in December 2004, at least five pending cases within the Fourth Circuit (in addition to this action) have been dismissed or remanded to state courts because the national bank has a branch in the adverse party's state.[5]

The five largest banks in the United States, as measured by assets, are national banks, and there are at least 164 national banks with branches in multiple states.[6] Affirmance of the Fourth Circuit decision would significantly restrict access to federal courts by a substantial portion of the banking industry, and thus deprive them of the recognized greater certainty, sophistication, fairness and uniformity provided by the federal judiciary.[7] Affirmance would also create a disincentive for national banks to expand their interstate operations, counter to congressional policy.

STATEMENT OF THE CASE

A divided panel of the United States Court of Appeals for the Fourth Circuit held that diversity jurisdiction was unavailable in an action between a citizen of a state and a national bank headquartered and chartered elsewhere but maintaining a branch in that state. This decision, which six of the nine voting judges of that court would have reconsidered en banc,[8] was

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[5] *Coots* v. *Wachovia Sec., Inc.*, 114 F. App'x 586 (4th Cir. 2004) (remand); *Nat'l Union Fire Ins. Co.* v. *Mfrs. & Traders Trust Co.*, No. 03-2276 (4th Cir.) (Order of Jan. 28, 2005, dismissing First Union, N.A. as a dispensable, non-diverse party); *Friel Prosthetics, Inc.* v. *Bank of America, N.A.*, No. Civ. A. DKC 2004-3481, 2005 WL 348263 (D. Md. Feb. 9, 2005) (remand); *Halifax Corp.* v. *Wachovia Bank, N.A.*, No. Civ. A. 03-578-A, 2005 WL 1799507 (E.D. Va. July 21, 2005) (dismissal); *Wachovia Bank, N.A.* v. *Ranson*, No. 04 CV 174, 2005 WL 555587 (W.D. Va. Feb. 28, 2005) (dismissal).

[6] *See* FDIC Institutional Directory, http://www.fdic.gov/idasp/main.asp (last visited Aug. 15, 2005). It is virtually certain that additional national banks have offices of operating subsidiaries, ATMs or some other physical presence in multiple states.

[7] *See, e.g., Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2618 (2005) ("[The] purpose of the diversity requirement . . . is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants."); THE FEDERALIST NO. 80, at 538 (Alexander Hamilton) (Jacob Cooke, ed. 1961) (asserting that "the federal courts [are] the proper tribunals for the determination of controversies between different states and their citizens" because "state tribunals cannot be supposed to be impartial"); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1803 (1992) ("The dangers of prejudice [against out-of-state parties] may often be subtle, but that only makes them more insidious."); Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 375 (1992) (surveying lawyers in removal cases and finding "that perceived bias against out-of-state litigants is still frequently reported, especially in less urban areas, and federal judges are perceived to be superior to their state court counterparts.").

[8] The Fourth Circuit decision was authored by Judge Luttig and joined by Judge Beezer, a Senior Circuit Judge of the Court of Appeals for the Ninth Circuit sitting by designation.

(footnote cont'd)

based on the Fourth Circuit's view that the word "located," as used in 28 U.S.C. § 1348, means wherever "physically present." The Fifth, Seventh and Ninth Circuits have rejected that interpretation, which is flatly at odds with the purposes of the National Bank Act and the history of Section 1348 itself.

SUMMARY OF ARGUMENT

Unless the Fourth Circuit decision is reversed, national banks will be deprived of access to the federal courts in many circumstances where state-chartered banks and corporations could invoke diversity jurisdiction. This would be contrary to the purposes behind the National Bank Act, including Congress' 1994 decision to encourage the growth of national banks across state lines, and would also frustrate the long-standing congressional policy of not placing national banks at a competitive disadvantage in relation to state-chartered banks. A critical element of this policy is jurisdictional parity. Indeed, as this Court long ago stated, Congress "intended to put national banks on the same footing as the banks of the state where they were located for all the purposes of the jurisdiction of the courts of the United States." *Leather Mfrs.' Nat'l Bank* v. *Cooper*, 120 U.S. 778, 780 (1887). In light of this, it was error for the Fourth Circuit to hold that a national bank is "located" for

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(footnote cont'd)

Judge King dissented. *Wachovia Bank, N.A.* v. *Schmidt*, 388 F.3d 414 (4th Cir. 2004). When Wachovia sought rehearing en banc, six of the Circuit's judges voted to grant the petition, while three voted against it, and four recused themselves. Although six of the nine voting judges agreed to grant the petition, rehearing was denied because the Fourth Circuit's rules then required that a majority of the thirteen active judges vote in favor.

purposes of 28 U.S.C. § 1348 in every state in which it is "physically present." 388 F.3d at 417. Other Courts of Appeals have rejected the Fourth Circuit's interpretation and thus have declined to create the anomalous rule that the doors of federal courts are closed to federally-chartered national banks in circumstances where they are open for state-chartered entities.

ARGUMENT

I. THE FOURTH CIRCUIT DECISION IS AT ODDS WITH A FUNDAMENTAL PURPOSE OF THE NATIONAL BANK ACT.

A. National Banks Are Creatures of Federal Law, Established with the Express Purpose of Exempting Them from State Interference.

Congress established national banks through legislation in 1863, subsequently amended by the 1864 National Bank Act.[9] Through the creation of national banks, Congress established a national banking system separate and independent from the existing state-chartered banks. *Tiffany* v. *Nat'l Bank of Missouri*, 85 U.S. 409, 412-13 (1873). As Senator Sumner explained, a national bank "must not be subjected to any local government, State or municipal; it must be kept absolutely and exclusively under that Government from which it derives its functions." CONG. GLOBE, 38th Cong., 1st Sess. 1893 (1864) (statement of Sen. Sumner).

Consistent with Congress' purpose in limiting state regulation of national banks, the National Bank Act

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[9] Act of June 3, 1864, ch. 106, 13 Stat. 99. The Act of June 3, 1864 was retitled the National Bank Act by the Act of June 20, 1874, ch. 343, 18 Stat. 123 (1874) (codified at 12 U.S.C. § 38).

protects national banks from state "visitorial" powers. 12 U.S.C. § 484(a) ("No national bank shall be subject to any visitorial powers except as authorized by Federal law . . . ."). Instead, the Office of the Comptroller of the Currency has, subject to certain exceptions, exclusive visitorial powers over national banks. 12 C.F.R. § 7.4000.

This Court has consistently acknowledged the unique status of national banks and the limits placed on state interference with those institutions by the National Bank Act. As this Court stated in 1927: "National banks are . . . agencies of the United States, created under its laws, to promote its fiscal policies . . . ." *First Nat'l Bank* v. *City of Hartford*, 273 U.S. 548, 550 (1927) (internal quotations omitted). *See also Davis* v. *Elmira Savings Bank*, 161 U.S. 275, 283 (1896) ("National banks are instrumentalities of the federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States."), *quoted in Marquette Nat'l Bank* v. *First Omaha Serv. Corp.*, 439 U.S. 299, 308 (1978); *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 10 (2003) ("[T]his Court has also recognized the special nature of federally chartered banks. Uniform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges are an integral part of a banking system that needed protection from 'possible unfriendly State legislation.'") (internal citation omitted).

In short, national banks are creatures of federal law, and their "special nature" precludes any undue or excessive interference or authority by the states. The Fourth Circuit's decision to force federally-created national banks to litigate many cases in local courts – when state-chartered legal entities are free to choose a federal forum – is inconsistent with those fundamental principles.

B. Congress Intended that National Banks Not Be Placed at a Competitive Disadvantage.

The provisions and amendments of the National Bank Act reveal Congress' consistent goal of ensuring that national banks not be placed at a competitive disadvantage in relation to state-chartered banks. For example, in the National Bank Act of 1864, Section 4 limited the tax rate on national banks to the rate imposed on state-chartered banks, and Section 30 permitted national banks to charge the same rate of interest as state-chartered banks.

During the last century, a particular concern of Congress was to avoid competitive disadvantage in branch banking. The McFadden Act, Pub. L. No. 69-639, § 6, 44 Stat. 1224, 1228 (1927), together with the Banking Act of 1933 (the Glass-Steagall Act), 48 Stat. 189, 190 (1933), permitted national banks to establish intrastate branches to the same extent state-chartered banks were allowed to do so. *See* 12 U.S.C. § 36(c)(1)-(2). Indeed, this Court noted almost forty years ago that "[i]t appears clear from this resume of the legislative history of [the McFadden and Glass-Steagall Acts] that Congress intended to place national and state banks on a basis of 'competitive equality' insofar as branch banking was concerned." *First Nat'l Bank* v. *Walker Bank*, 385 U.S. 252, 261 (1966). In 1969, this Court reiterated that the McFadden Act "reflects the congressional concern that neither system have advantages over the other in the use of branch banking." *First Nat'l Bank* v. *Dickinson*, 396 U.S. 122, 131 (1969). "The policy of competitive equality is . . . firmly embedded in the statutes governing the national banking system." *Id.* at 133.

Congress continued generally to further this goal, and with respect to branching in particular, in the 1994 Riegle-Neal Act, which forbids states from treating national bank branches less favorably than state-chartered

banks. *See* Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328 § 102, 108 Stat. 2338, 2350 (1994) (codified at 12 U.S.C. § 36(f)(1)) (requiring that where federal preemption does not apply, a host state's laws "regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches shall apply to [in-state branches of national banks] to the same extent as [to state banks]").

It is thus fundamental to our dual banking system that national banks not be placed at a competitive disadvantage to state-chartered banks. Nowhere is this policy more consistently and extensively stated than with respect to branching.

C. Congress Has Encouraged the Growth of National Banks and, in 1994, Authorized Such Banks To Expand Widely Across State Lines.

Congress has long supported the growth and development of national banks. In *Tiffany*, 85 U.S. at 413, this Court explained that national banks:

> were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the General government. It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the States, or to ruinous competition with State banks. On the contrary, much has been done to insure their taking the place of State banks.

Consistent with this basic approach, Congress sought to facilitate the growth of national banks, first within the states through the McFadden Act (*see*, p. 9, *supra*), and finally – just eleven years ago – among the states.[10] In 1994, Congress for the first time made widespread interstate branch banking lawful for both national banks and state-chartered banks through the Riegle-Neal Act. Pub. L. No. 103-328, §§ 102-103, 108 Stat. 2338, 2349, 2352 (1994) (amending 12 U.S.C. §§ 36 & 1842(d)). As a result, interstate banking by both national banks and state-chartered banks has in the past decade grown dramatically; today, national banks have more than 16,000 interstate branches and state-chartered banks have almost 6,000 interstate branches.[11]

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[10] The 1927 McFadden Act, together with the 1933 Glass-Steagall Act, authorized the creation of multiple *intra*state branches for national banks to the same extent as permitted by state law for state banks, and did not authorize *inter*state branch banking except in very limited exceptions. These "grandfather" exceptions were for branch bank offices that already existed for twenty-five years, and existing branches of a state bank that converted to a national bank (a recodification of an exception that dates back to 1865). *See* 44 Stat. 1224; *see also* Act of March 3, 1865, ch. 78, § 7, 13 Stat. 459. It appears that there were only two "grandfathered" banks. (*See* p. 13, *infra*.)

[11] *See* Conference of State Bank Supervisors, Number of Commercial Banks by Charter (2004), http://csbs.org/pr/presentations/2004/StateBankingStatisticsJuly2004.pdf (last visited Aug. 15, 2005).

II. 28 U.S.C. § 1348 REQUIRES JURISDICTIONAL PARITY BETWEEN NATIONAL BANKS AND STATE-CHARTERED BANKS.

A. The Legislative History of 28 U.S.C. § 1348 Demonstrates Congress' Intent To Place National Banks and State-Chartered Banks on an Equal Footing.

Although Congress initially granted federal courts jurisdiction over all suits to which a national bank was a party, in 1882 Congress eliminated automatic federal question jurisdiction for national banks in an amendment to the National Bank Act (the "1882 Amendment"). *See Leather Mfrs.' Nat'l Bank*, 120 U.S. at 780-81. The 1882 Amendment expressly provided that jurisdiction over national banks "shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States . . . ." Act of July 12, 1882, ch. 290, 22 Stat. 162, 163. A congressional sponsor also explained that the 1882 Amendment "declares that the jurisdictional limits for and as to a national bank shall be the same as they would be in regard to a State bank . . . ." 13 CONG. REC. 4049 (1882) (statement of Rep. Hammond), *quoted by Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555, 566 n.22 (1963).

In 1887, Congress revised the jurisdictional statute to say that "national bank associations . . . shall . . . be deemed citizens of the States in which they are respectively located . . . ." Act of Mar. 3, 1887, ch. 373, 24 Stat. 552, 554 (the "1887 Act"). No substantive change was intended: the 1887 Act indicated that Congress intended to maintain jurisdictional parity between national banks and state banks: "[I]n such cases [involving national banks,] the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State." 24 Stat. at 554-55.

In 1911, Congress again revised the relevant statute, using language in material respects identical to the current statute: "[A]ll national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located." Judicial Code of 1911, Pub. L. No. 61-475, § 24, 36 Stat. 1087, 1093 (1911). This Court concluded that the 1911 amendment was not intended to change the meaning of the statute in any respect. *Federal Intermediate Credit Bank* v. *Mitchell*, 277 U.S. 213, 216 (1928) (explaining that "no change of intent is to be implied unless clearly made manifest"). *See also Hermann* v. *Edwards*, 238 U.S. 107, 118 (1915).

In 1948, Congress codified the 1911 provision as 28 U.S.C. § 1348, which similarly provides that, with limited exceptions that are inapplicable here, "[a]ll national banking associations shall . . . be deemed citizens of the States in which they are respectively located." Section 1348 has not been altered since the 1948 codification.

As shown above (*see* pp. 10-11, *supra*), when 28 U.S.C. § 1348 was last revised in 1948 virtually no interstate branch banking existed or was permitted. *See also Girard Bank* v. *Bd. of Governors of Fed. Res.*, 748 F.2d 838, 840 (3d Cir. 1984) (noting that "[t]he McFadden Act, as a general matter, confined national banks to intrastate branching," and that "only two national banks . . . were permitted to maintain interstate branches under the Act's 'grandfather clause'"). Thus, directly contrary to a central thesis of the Fourth Circuit's decision (388 F.3d at 421, 424), in 1948 Congress could not have intended the word "located" to refer to branch bank offices in multiple states because there was then virtually no interstate branch banking. And given the long history of the predecessors to Section 1348, it is

crystal clear that Congress did not intend for that statute to put national banks at a disadvantage when it comes to obtaining access to our federal courts.

B. This Court Has Consistently Recognized Congress' Policy of Maintaining Jurisdictional Parity.

This Court has recognized the important congressional policy of jurisdictional parity between national banks and state-chartered banks. In *Leather Manufacturers' National Bank*, the Court interpreted the 1882 Amendment as placing "national banks on the same footing as the banks of the state where they were located for all the purposes of the jurisdiction of the courts of the United States." 120 U.S. at 780; *see also Petri* v. *Commercial Nat'l Bank*, 142 U.S. 644, 649 (1892) (stating that the 1882 Amendment "placed [national banks] in the same category with banks not organized under the laws of the United States"); *Langdeau*, 371 U.S. at 566 ("[The 1882 Act] apparently sought to limit, with exceptions, the access of national banks to, and their suability in, the federal courts to the same extent to which non-national banks are so limited."). This Court also observed in analyzing the 1887 Amendment that "[n]o reason is perceived why it should be held that Congress intended that national banks should not resort to federal tribunals as other corporations and individual citizens might." *Petri*, 142 U.S. at 650-51.

III. THE WORD "LOCATED" IN 28 U.S.C. § 1348 DOES NOT MEAN "PHYSICALLY PRESENT."

As shown above, Congress intended that national banks not be competitively disadvantaged in relation to state-chartered banks, and that those entities have "parity" when it comes to federal court jurisdiction. Instead of interpreting 28 U.S.C. § 1348 to reflect these long-standing principles, the Fourth Circuit erred by looking no further than certain selected dictionaries to

define the word "located," and declaring that the word is "unambiguous." This is contrary to the interpretation of three Courts of Appeals and the Office of the Comptroller of the Currency.

A. Three Courts of Appeals and the Federal Regulator of National Banks Have Interpreted "Located" Differently from the Fourth Circuit.

The Fourth Circuit's view of the meaning of 28 U.S.C. § 1348 is contrary to recent decisions from the United States Courts of Appeals for the Seventh and Fifth Circuits. In *Firstar Bank, N.A.* v. *Faul*, 253 F.3d 982, 986 (7th Cir. 2001), the Seventh Circuit found that "[t]he language of the 1887 Act, [including the 'located' language in 28 U.S.C. § 1348], has been consistently interpreted by the Supreme Court to maintain jurisdictional parity between national banks and state banks or other corporations." As a result, the court concluded that "for purposes of 28 U.S.C. § 1348 a national bank is 'located' in, and thus a citizen of, the state of its principal place of business and the state listed in its organization certificate." *Id.* at 994. Similarly, in *Horton* v. *Bank One, N.A.*, 387 F.3d 426, 430 (5th Cir. 2004), the Fifth Circuit noted that "[t]he Supreme Court has concluded that the objective of the 1882 and 1887 Acts was to create jurisdictional parity between national banks on the one hand and state banks and corporations on the other." The Fifth Circuit concluded that the "goal of jurisdictional parity is best served by interpreting 'located' as referring to a national bank's principal place of business as well as the state specified in the bank's articles of association." *Id.* at 431.

Indeed, as early as 1943, the Ninth Circuit addressed the predecessor statute to 28 U.S.C. § 1348 and held that one of the two national banks with grandfathered interstate branches, Bank of California, was *not* a citizen of a state in which it maintained a

branch. *American Surety Co.* v. *Bank of California*, 133 F.2d 160, 162 (9th Cir. 1943). In reaching this decision, the court found that "[t]here would appear to be a close analogy between [a national] bank and a corporation national in scope." *Id.* Although this decision was reached over sixty years ago, it is particularly relevant because it was the only Court of Appeals decision precisely on point when Congress codified Section 1348 five years later.[12]

Consistent with the above decisions, the Office of the Comptroller of the Currency ("OCC")[13] concluded in 2002 that "located" in 28 U.S.C. § 1348 means the state where a national bank has its main office. Three years ago, in response to a request for an interpretation of the word "located" in Section 1348, the OCC stated that "[n]ational banks are to be treated for diversity jurisdiction purposes in a manner similar to state banks" and that "located" means "the place where the bank's main office is currently located . . . ." Bank of America, OCC Interpretive Letter No. 952, 2003 WL 23221430, at *4, 1 (Oct. 23, 2002). This interpretation is respectful of the principle of jurisdictional parity.

Because the provision in question was originally enacted as part of the National Bank Act, the

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[12] If the Fourth Circuit regards the enactment of Section 1332 ten years after Section 1348 as "soon afterward" (388 F.3d at 431), then the five-year gap between the *Bank of California* decision and the enactment of Section 1348 must be "very soon afterward."

[13] The OCC – a bureau of the Department of the Treasury – charters, regulates and supervises all national banks. *See* Comptroller of the Currency Administrator of National Banks: http://www.occ.treasury.gov/aboutocc.htm.

interpretation of the OCC (the regulator of national banks) should be given weight. *See Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.")[14]

Thus, the rulings of three Courts of Appeals, and the OCC's interpretation, all reject the Fourth Circuit's holding that "located" in Section 1348 means wherever "physically present." National banks should be entitled to invoke diversity jurisdiction in circumstances where state-chartered banks or corporations can do so.

B. The Word "Located" Should Not Be Interpreted in Isolation.

The Fourth Circuit came to its erroneous conclusion in large part because it defined the word "located" in Section 1348 by relying upon certain selected dictionary definitions, 388 F.3d at 416-18, and as

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[14] Although the OCC's regulatory mandate does not include administering 28 U.S.C. § 1348, its responsibilities and expertise put it in a special position to reflect accurately the congressional intent behind the National Bank Act and the principle of jurisdictional parity. *Cf. Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388, 403-04 (1987) ("The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of th[e] principle" that "courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute."); *NationsBank* v. *Variable Annuity Life Ins.*, 513 U.S. 251 (1995) (deferring to the OCC's interpretation of the term "the business of banking" in the National Bank Act).

a result the court gave short shrift to the context and history of the statutory language.[15] This was clear error. Resorting to a dictionary ought not to substitute for understanding a statute's meaning by examining the necessary context, particularly when there are differing dictionary definitions. *See Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997) (explaining that the interpretive inquiry is limited to the statute and the language itself only when "the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case"); *see also Phillips* v. *AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc) ("The main problem with elevating the dictionary to such prominence is that it focuses the inquiry on the abstract meaning of words rather than on the meaning of [] terms within the context . . . ."). Indeed, in *Firstar Bank*, the Court of Appeals for the Seventh Circuit consulted three dictionaries, including WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1327 (1993) (defining "locate" as "to set or establish in a particular spot or position"), and concluded that "the ordinary definition of 'located' does not provide a clear answer to" interpreting Section 1348. 253 F.3d at 987. In this action as well, Judge King's dissent demonstrated that because different dictionaries define the word "located" differently, the choice of a dictionary could very well change the outcome. *See* 388 F.3d at 434, where Judge King cited the definition of "location" in BLACK'S LAW DICTIONARY 958 (8th ed. 2004) as "[t]he *specific* place or position of a person or thing" (emphasis added).

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[15] The Fourth Circuit cited no statutory language or legislative history indicating that Congress intended Section 1348 to create a competitive disparity.

The word "located" is used in a number of provisions of the National Bank Act, and this Court has concluded on each occasion that it has been called upon to examine the meaning of "located" that there is no simple, plain meaning of the word, but that a contextual analysis is necessary. For example, in *Citizens & Southern National Bank* v. *Bougas*, 434 U.S. 35, 44 (1977), this Court recognized that "[t]here is no enduring rigidity about the word 'located.'"[16] In *Bougas*, the Court looked to legislative history to interpret "located" in the context of state-court venue.[17] Similarly, in *Marquette*

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[16] Consistent with this conclusion, the National Bank Act itself uses the word "located" to mean different things in different provisions. *Compare* 12 U.S.C. § 29 (discussing "the law of the state in which the association is located"), *with* 12 U.S.C. § 36(j) (defining "branch" to include "any branch place of business located in any State or Territory of the United States . . . ."). If the word "located" were unambiguous, then that word presumably could not have these different meanings.

[17] In *Bougas*, the Court concluded, in light of the relevant legislative history, that for the purposes of state-court venue, a national bank is deemed to be located at each of its branch bank offices. The Court found "[w]hat Congress was concerned with was the untoward interruption of a national bank's business that might result from compelled production of bank records for distant litigation," a concern that "largely evaporates when the venue of a state-court suit coincides with the location of an authorized branch." 434 U.S. at 44. The *Bougas* case did not touch upon diversity jurisdiction, where the concerns are far different. Although the Fourth Circuit maintained that jurisdiction and venue are the same subject matter for purposes of its *in pari materia* argument (388 F.3d at 420), they are not. Jurisdiction relates to *whether* the federal courts are available; venue relates to *which* federal (or state) courts are available. Perhaps even more importantly, the

(footnote cont'd)

National Bank, this Court again looked to legislative history for guidance in defining "locate" in the context of a provision of the National Bank Act governing interest rates, and concluded that "[t]he congressional debates surrounding the enactment of [the provision] were conducted on the assumption that a national bank was 'located' for purposes of the section in the State named in its organization certificate." 439 U.S. at 310 (citing CONG. GLOBE, 38th Cong., 1st Sess. 2123-27 (1864)).

Moreover, in interpreting another statute, this Court has explicitly rejected the "physical presence" definition of "located" that the Fourth Circuit adopted from consulting dictionaries. In the context of the Natural Gas Act, this Court wrote, "we think that 'is located' means more than having physical presence or existence in a place . . . ." *Federal Power Comm'n* v. *Texaco, Inc.*, 377 U.S. 33, 38 (1964). In *Texaco*, the venue provision in the Natural Gas Act stated that a natural gas company may obtain review in the United States Court of Appeals where it "is located or has its principal place of business, or in the United States court of appeals for the District of Columbia." *Id.* at 37. This Court looked to the context and examined the language used in predecessor statutes to determine that "located" – for purposes of that statute – means only a corporation's state of incorporation. The point, of course, is that a selected dictionary definition of "located" may not

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(footnote cont'd)

critical policy issue here, jurisdictional parity between national and state-chartered banks, was not a consideration in *Bougas*.

provide – in view of the overall context – the most logical or sensible interpretation.[18]

The Fourth Circuit's decision to make the meaning of 28 U.S.C. § 1348 turn on a particular dictionary definition led to a result that is "at war with" the long legislative and judicial history of that statute and the National Bank Act. *Cf. Continental Illinois Nat'l Bank* v. *Chicago, Rock Island & P. Ry.*, 294 U.S. 648, 684 (1935) (rejecting a construction of "wherever located" that was "at war with the whole spirit and purpose of the law").

C. "Located" in Section 1348 Does Not Mean "Physically Present."

28 U.S.C. § 1348 was enacted long before Congress passed the 1994 Riegle-Neal Act authorizing banks to open branch offices in multiple states.[19] In 1948, Congress thus necessarily understood national banks to be "located" in one state only. Under those circumstances, Congress could not have intended by Section 1348 to put national banks at a disadvantage for

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[18] If the word "located" necessarily and unambiguously means wherever one has a physical presence, then the six words after "located" in 12 U.S.C. § 92, "located and doing business in any place," are superfluous. Of course, Section 1348 does not contain the words "and doing business in any place."

[19] The Fourth Circuit inaccurately stated that Congress made interstate branch banking lawful prior to the 1948 codification of 28 U.S.C. § 1348. 388 F.3d at 421; *see* pp. 10-11, *supra*. This error apparently led the Fourth Circuit to assume that Congress used the word "located" in Section 1348 with interstate branch banking in mind.

purposes of gaining access to federal courts in diversity cases.

Moreover, the Fourth Circuit's interpretation of "located" makes no sense in light of the statute's language and purpose. 28 U.S.C. § 1348 is made up of two sentences. The first places three types of legal actions involving national banks under the original jurisdiction of the federal district courts.[20] The second – the sentence at issue here – has now been interpreted by the Fourth Circuit to limit drastically the access of national banks to the federal courts. This is exactly contrary to Congress' intent, going back to the 1860's, to ensure that national banks have jurisdictional parity. *See* pp. 12-14, *supra*.

D. In the Context of Modern Banking, the Fourth Circuit's Decision Would Unreasonably Impair the Access of National Banks to the Federal Courts.

If the Fourth Circuit decision is not reversed, national banks will be substantially deprived of equal access to the federal courts, an outcome at odds with both long-standing congressional policy favoring independence of national banks from state regulation, and more recent congressional policy favoring the growth of interstate operations by national banks.

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[20] The first sentence of Section 1348 provides that federal "district courts shall have original jurisdiction of" (i) cases "commenced by the United States, or by direction of any officer thereof, against any national banking association," (ii) "any civil action to wind up the affairs of any such association," and (iii) certain actions by a national bank "to enjoin the Comptroller of the Currency, or any receiver acting under his direction." 28 U.S.C. § 1348.

Moreover, the Fourth Circuit's reliance on "physical presence" to determine citizenship for diversity purposes threatens even greater mischief than may first appear, because this approach could be expanded to apply in the numerous states where a national bank maintains a presence that does not constitute a "branch." The National Bank Act defines a "branch" as any "branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(j). This definition explicitly excludes "an automated teller machine or a remote service unit" (*id.*) and implicitly excludes most loan production offices and back-office operations, although each might be deemed to constitute a "physical presence." At a minimum, there will be considerable uncertainty and controversy. As just one example, this Court has held that a mobile armored car service can be a "branch" under the National Bank Act. *Dickinson*, 396 U.S. at 137-38. Would a national bank be "located" in every state serviced by such an armored car service? Would the answer depend upon the regularity or frequency of the service?

The interpretation of Section 1348 adopted by the Fourth Circuit – even if limited to branches as defined by the National Bank Act – threatens greatly to impair the access of national banks to the federal courts. The "physical presence" definition would not only further limit that access but be a constant source of confusion and litigation.

CONCLUSION

Under the Fourth Circuit decision, federal diversity jurisdiction for national banks would be significantly restricted, contrary to the congressional goals of "jurisdictional parity" and not placing national banks at a competitive disadvantage. The Fourth Circuit decision should be reversed.

Respectfully submitted,

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